No. 82-1998

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

LEONARD SCHAITMAN
KATHERINE S. GRUENHECK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the National Park Service violated the First Amendment by enforcing 36 C.F.R. 50.27(a), which restricts camping in the national parks, to prevent respondents from sleeping in Lafayette Park and on the Mall in connection with a demonstration of the plight of the homeless.

PARTIES TO THE PROCEEDING

Manus J. Fish, Regional Director of the National Capital Region of the National Park Service, was named as a defendant in the complaint and is a petitioner here. Mitch Snyder, Mary Ellen Hombs, Harold Moss, Clarence West, Monroe Kylandezes, Fred Randall, and Mike Scott were plaintiffs in the district court and are respondents here.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-87a) is reported at 703 F.2d 586. The opinion and order of the district court (Pet. App. 90a-112a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 88a-89a) was entered on March 9, 1983. The petition for a writ of certiorari was filed on June 7, 1983, and was granted on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment and the relevant regulations are set forth in the Appendix, *infra*.

STATEMENT

1. This case involves a clash between the interests of the government in regulating for the benefit of the general public the uses of the National Memorial-core area parks—specifically, Lafayette Park and the Mall—and the asserted First Amendment interests of persons wishing to use these parks for sleeping accommodations in order to demonstrate the plight of the homeless.

The National Memorial-core parks are set in the heart of Washington, D.C. They were included in the original plan drawn up for the capital by Major Pierre L'Enfant. The Mall creates a matchless vista stretching from the rear of the Capitol on the east to the Lincoln Memorial on the west, and includes the Washington Monument and a series of reflecting pools.[1] Lafayette Park is a square of approximately seven acres located across the street from the White House.[2] It was originally included in the "President's Park" (the White House grounds); President Jefferson decided, however, to set aside this area as a separate park for the use of residents and visitors to Washington. In 1824 it was named Lafayette Park in honor of Major General Marquis de Lafayette, hero of the American Revolution. The park contains five statues honoring heroes of the early days of the Republic, and "functions as a formal garden park of meticulous landscaping with flowers, trees, fountains, walks and benches * * *." National Park Service, U.S. Dep't of Interior, *Resource Management Plan for President's Park* 4.3 (1983). In addition to the physical splendor of these parks, in the nearly 200 years since the L'Enfant Plan was designed both Lafayette Park and the Mall have taken on a rich historical and symbolic significance. They are visited by millions who seek to find enjoyment and

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[1] A thorough history of the Mall is contained in National Park Service, U.S. Dep't of Interior, *History of the Mall* (G. Olszewski 1970).

[2] See National Park Service, U.S. Dep't of Interior, *Historic Research Series No. 1, Lafayette Park* at vii (G. Olszewski 1964).

inspiration in their beauty, their serenity, and their evocation of our country's past.

The Memorial-core area parks are administered today as part of the network of national parks. Since 1893, the Interior Department, through the National Park Service, has been charged with responsibility for management and maintenance of all national parks. The National Park Service is required to

> promote and regulate the use of the * * * national parks * * * by such means and measures as conform to the fundamental purpose of said parks, * * *, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. 1. The Secretary of the Interior is authorized to promulgate rules and regulations for the use and management of these parks in accordance with the purposes for which they were established. 16 U.S.C. 3, 1a-1.

Pursuant to this authority, the Secretary of the Interior has adopted a variety of rules and regulations governing the use of the Memorial-core area parks. From the inception of the modern regulation of these areas, it seemed obvious that it would be completely contrary to the purposes of these splendid and unique parks to allow people to camp in them; consequently, sleeping or camping with intent to remain more than four hours has been prohibited. See 36 C.F.R. 3.4(i) (1939); 36 C.F.R. 50.25(k).[3] In 1941, regulations were issued governing

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[3] In *United States* v. *Abney*, 534 F.2d 984 (D.C. Cir. 1976), the court of appeals held that this regulation could not constitutionally be applied to prevent a demonstrator from holding an around-the-clock vigil in the park because the regulation (by containing a proviso permitting the conduct in question "upon proper authorization of the Superintendent") gave the park superintendent unfettered enforcement discretion.

the holding of public assemblies, speeches, and the public expression of views in the park areas. The regulations allowed these activities to take place in most park areas upon the issuance of a permit, but in certain areas—including Lafayette Park—"public gatherings and the making of speeches" were prohibited on the ground that "the particular purpose to which the area is devoted makes its use for public gatherings contrary to the comfort, convenience and interest of the general public." 36 C.F.R. 3.7(n)-(q) (1943). In the 1968 revision of the regulations, Lafayette Park was deleted from the list of areas in which demonstrations could not be held. See 36 C.F.R. 50.19(c).

The regulations now in effect permit camping in the national parks only in campgrounds designated for that purpose by the Superintendent of Public Parks. 36 C.F.R. 50.27(a). No such campgrounds are—or ever have been—designated in the Memorial-core area. "Camping" is defined as the "use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or * * * other structure * * * for sleeping or doing any digging or earth breaking or carrying on cooking activities." *Ibid.* The regulation further provides that "[t]he above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging." *Ibid.*

The current regulations also authorize holding demonstrations for the expression of views or grievances in the Memorial-core area pursuant to 36 C.F.R. 50.19. With minor exceptions, such demonstrations may be held only in accordance with an official permit issued by the National Park Service. *Ibid.* The regulations recognize that

temporary structures may be erected in connection with permitted demonstrations but provide that such structures may not be used for camping. 36 C.F.R. 50.19(e)(8).[4]

2. In 1982, respondent Community for Creative Non-Violence (CCNV) applied for a permit from the National Park Service to conduct a demonstration in Lafayette Park and on the Mall beginning on December 21, 1982, and continuing through the last day of winter, for the stated purpose of demonstrating the plight of the homeless (J.A. 9-15). In particular, CCNV requested permission to erect 60 symbolic tents, lay down bedding, and have approximately 150 participants sleep at the campsite as part of its demonstration (Pet. App. 92a-93a).[5] CCNV explained in its application materials that, "absent a survival-related reason for being in Lafayette Park—something such as a meal or the chance to sleep in relative warmth—they [the homeless] * * * would not come" and that "[w]ithout the incentive of sleeping space or a hot meal, the homeless would not come to the site" (J.A. 14; Pet. App. 45a n.10, 69a, 93a). The National Park Service granted the permit on a seven-day, renewable basis but denied CCNV permission to lay down bedding or sleep in the symbolic tents, citing the camp-

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[4] These regulations were revised effective June 4, 1982. See 47 Fed. Reg. 24299-24306. The revisions, in particular the explicit statement that the use of an area for living accommodation purposes constitutes "camping" regardless of the intent of the participants, were prompted by the decision in *Community for Creative Non-Violence* v. *Watt (CCNV I)*, 670 F.2d 1213 (D.C. Cir. 1982), which held that sleeping in tents by demonstrators in connection with First Amendment activities did not constitute "camping" prohibited under then-existing regulations.

[5] CCNV had held a similar demonstration on a much smaller scale the previous winter after the court of appeals held in *CCNV I* that the National Park Service's "no camping" regulations did not extend to the activities in which CCNV sought to engage because they were related to First Amendment activities. That demonstration consisted of setting up and sleeping in nine tents in Lafayette Park. See *CCNV I*, 670 F.2d at 1215.

ing prohibition in the pertinent regulations, 36 C.F.R. 50.19(e)(8) and 50.27(a) (J.A. 16-17).

On September 7, 1982, CCNV and the other named plaintiffs, who are described as either individual members of CCNV or homeless individuals, brought this suit in the United States District Court for the District of Columbia, challenging the constitutionality of the relevant regulations. CCNV sought a preliminary injunction against enforcement of these regulations, arguing that they were vague, overbroad, unequally enforced, and violative of respondents' First Amendment rights. Both parties filed motions for summary judgment.

The district court denied the request for an injunction and granted summary judgment for the government, holding that the regulations were valid both on their face and as applied (Pet. App. 91a-112a). The court first concluded that the act of sleeping in this context was not " 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth amendments.' " *Id.* at 102 (quoting *Spence* v. *Washington*, 418 U.S. 405, 409 (1974)). The court further held that under the standards set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968), any incidental restriction on First Amendment rights created by the regulations was justified (Pet. App. 104a-106a). The court also rejected respondents' contention that the regulations had not been fairly and uniformly enforced (*id.* at 106a-108a).

3. Respondents appealed, and a panel of the court of appeals heard argument. Before the panel decided the case the court sua sponte directed that it be heard en banc. In a one sentence per curiam decision, the en banc court, by a 6-5 vote, reversed the district court and enjoined the government "from prohibiting sleeping by demonstrators in tents in sites authorized for [respondents'] demonstration" (Pet. App. 2a).[6] This disposition

[6] On March 17, 1983, the Chief Justice ordered the mandate of the court of appeals recalled and stayed its reissuance pending further order of the Court. On March 21, 1983, the full Court con-

was supported by a plurality opinion, joined in whole by two judges and in part by three other judges, and by three concurring opinions. The splintered majority agreed that the National Park Service's "no camping" regulations were valid on their face. It was also agreed that, in the circumstances of this case, to apply them to bar sleeping as part of CCNV's demonstration would violate the First Amendment. There was, however, no consensus as to why the regulations as applied violated respondents' First Amendment rights.

The plurality opinion of Judge Mikva (joined by Judge Wald) found that, in the context of this demonstration, sleeping in symbolic tents would be a communicative act and hence protected by the First Amendment. Seeking to eschew "wooden categorizations" (Pet. App. 13a), Judge Mikva explained that "the sleeping proposed by CCNV is carefully designed to, and in fact will, express the demonstrators' message that homeless persons have nowhere else to go" (*id.* at 14a), and that "[i]n the present case, within the context of a large demonstration with tents, placards and verbal explanations, the communicative context is sufficiently clear that the participant's sleeping cannot be arbitrarily ruled out of the arena of expressive conduct" (*id.* at 15a (footnotes omitted)). In any event, even apart from "the peculiarly expressive nature of sleeping," stated Judge Mikva, CCNV's "proposed 'presence' is intended to be expressive" and, consequently, "CCNV's twenty-four hour presence is entitled to the same first amendment protection as a vigil" (*id.* at 17a).

On the other hand, continued Judge Mikva (*id.* at 18a (footnote omitted)):

> we reject CCNV's contention that sleeping in its demonstration is uniquely deserving of first amendment protection because it directly embodies the group's message that homeless people have no place else to sleep. Under CCNV's distinction, a group

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tinued that order in effect pending the timely filing and disposition of a petition for a writ of certiorari (No. A-771).

> with a "no-place-to-sleep" message (such as the homelessness of refugees) could express it by deliberately sleeping, but a group with a different message (such as opposition to the nuclear arms race) could not sleep. Such a distinction is impermissible * * *.

Purporting to apply the analysis set forth by this Court in *United States* v. *O'Brien, supra*, Judge Mikva then turned to the question whether the government's interests in enforcing the regulations "are furthered by prohibiting expressive sleeping by all individuals or groups similarly situated to CCNV" (Pet. App. 22a). He concluded that "there are no incremental savings of park resources" to be gained by prohibiting sleep (*id.* at 22a-23a). Judge Mikva stated that the National Park Service was entitled to distinguish, in applying its regulation, between "sleeping that is expressive as part of a twenty-four hour vigil * * * [and] sleeping that is a mere convenience to daytime demonstrators" (*id.* at 25a). He concluded that the government's interests would not be sufficiently furthered "by keeping these putative protestors" from sleeping (*id.* at 28a).

As to the future, Judge Mikva's opinion concluded (Pet. App. 29a-30a (footnote omitted)):

> Finally, the Park Service cannot mechanically apply its regulations to requests from groups seeking to exercise first amendment rights through sleeping. Although the government can and must retain a "content-neutral" obliviousness to the kind of message which a particular group seeks to express through sleeping, the Park Service cannot be oblivious to the implications of the first amendment—or the attendant complications. Each distinction and each line the Park Service draws in such applications must bear close scrutiny to ensure that symmetry of management does not crowd out first amendment claims.
>
> We doubt that this will be the last occasion that this court will have to undertake the difficult reconciliation of first amendment activities with the

necessity for order and management in the Mall and Lafayette Park. In a pluralistic society boasting of its free expression, we can expect no less.

Chief Judge Robinson and Judge Wright concurred, with the caveat that they "intimate[d] no view as to whether sleeping would implicate the First Amendment were it not to add its own communicative value to the demonstration" (Pet. App. 31a). Judge Edwards filed a concurring opinion, disagreeing with portions of Judge Mikva's opinion, but reaching the same result (*id.* at 32a-40a). Judge Edwards stated that, on the facts of this particular case, sleeping was "symbolic speech" covered by the First Amendment (*id.* at 33a-34a). He argued that it was not impermissible for the government to distinguish between sleep where a "message is intended" and sleep that is merely facilitative (*id.* at 36a). He concluded that under *O'Brien* the regulations could not constitutionally be applied to bar CCNV's demonstration because there are "reasonable * * * regulatory alternatives less restrictive * * * than a total ban against sleeping [that] still would accommodate the significant governmental interests at stake" (*id.* at 39a). Among the alternatives mentioned by Judge Edwards as less restrictive than a "total ban" on sleeping were rules limiting the number who may sleep, first-come-first-served rules, and—"perhaps"—rules preventing a person from sleeping "beyond a specified, successive number of hours or days" (*ibid.*).

Judge Ginsburg concurred only in the judgment (Pet. App. 41a-48a). She characterized respondents' sleeping as "speech plus" (*id.* at 46a) that was not necessarily entitled to the same protection as traditional speech, but was sufficient "to require a genuine effort to balance the demonstrators' interests against other [government] concerns" (*id.* at 47a). Because she found it irrational to allow "tenting, lying down, and maintaining a twenty-four hour presence" while forbidding sleeping, Judge Ginsburg concluded that the line drawn in the regula-

tions was not sufficiently "sensible, coherent, and sensitive to the speech interest involved" (*id.* at 48a).

Judge Wilkey, joined by four judges, dissented (Pet. App. 49a-77a). Although expressing considerable doubt on the issue (*id.* at 56a-60a), Judge Wilkey assumed that respondents' sleeping activity could constitute a form of communication protected by the First Amendment and that the *O'Brien* analysis was therefore applicable (*id.* at 60a). Examining the general government interest in preventing camping in the Memorial-core area (see *id.* at 63a-66a), Judge Wilkey concluded that the regulation served a substantial interest in conserving park resources and preserving the right of non-campers to enjoy the parks; he found that this interest outweighed occasional incidental restrictions on the activities of demonstrators (*id.* at 66a-71a). Judge Wilkey further stated that there was no constitutionally permissible less restrictive alternative to the total ban on camping (*id.* at 71a-77a) because "[a]ny intermediate position designed to accommodate 'First Amendment camping' would run afoul of the proscriptions against discretionary screening" (*id.* at 73a). Judge Scalia, joined by two judges, filed a separate dissenting opinion (*id.* at 78a-87a) denying that "sleeping is or can ever be speech for First Amendment purposes" (*id.* at 78a). Because the regulations proscribe the activities in question for reasons having nothing to do with their communicative character, Judge Scalia concluded that they did not implicate First Amendment concerns.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Memorial-core area parks—as the name itself implies—constitute a unique national resource. Established as part of the celebrated original design to create a noble capital city, they are a memorial to our nation's past and an evocation of our aspirations for beauty and community. They constitute a "core"—a heartland. They belong to us all. They are visited by millions, who come to wander and stroll, to play or jog, to stand in awe at

the Washington Monument or in reverence at the Vietnam Memorial.

Just because these areas have a special place in the national consciousness and because they have such resonance, they also constitute a fitting and powerful forum for political expression and political protest. When Marian Anderson was excluded from Constitution Hall because her skin was black, what more moving place could there be for her great concert than the Lincoln Memorial? When hundreds of thousands came to protest against the war in Vietnam, it seemed fitting and natural that the march should proceed along the Mall.

The parks are, in sum, a special national treasure, subject to many different sorts of uses. That is why the question of what powers the government has to regulate them is, inevitably, a grave issue of public law. The Secretary of the Interior is under a special mandate from Congress to manage the competing uses of these parks and to maintain them so as to fulfill their manifold purposes. It is a task that requires both sensitivity and common sense; it raises some questions of genuine difficulty. But from the beginning of this regulatory enterprise, every Secretary of the Interior has, without any difficulty, concurred in one starting place: nobody should be allowed to *live* in these parks. The Memorial-core area parks are not suitable for camping. They are too small, too fragile, too crowded and too sacred to be taken over as anyone's living quarters; nobody may sleep over in Lafayette Park or the Mall.

It is in the face of this longstanding and unanimously maintained rule that respondents sought permission from the National Park Service to conduct a demonstration in Lafayette Park and the Mall to protest the plight of the homeless. The demonstration was to last the entire winter, and respondents proposed to establish campsites where 150 demonstrators would sleep in some 60 tents for the three-month period of the demonstration. The National Park Service pointed out that the proposal plainly violated the regulations prohibiting camping—de-

fined as "the use of the park land for living accommodation purposes." Indeed, it is difficult to imagine a proposal more at odds with the regulatory prohibition: the demonstrators desired to live in Lafayette Park and the Mall for three months precisely in order to demonstrate that they have no other place to live. Consequently, the demonstration permit issued by the Park Service expressly prohibited respondents from using the parks as a place to sleep. The Park Service did, in accordance with the regulations—and in what was an attempt to accommodate First Amendment values as sensitively as possible—grant a renewable seven-day license to respondents to demonstrate on a 24-hour basis and to erect "symbolic" campsites.

On these facts, a narrow majority of the court of appeals, in a remarkable disarray of divergent opinions, held that the regulations may not be enforced against respondents because to do so would violate their First Amendment right to freedom of speech.

Our central submission is simple: the First Amendment does not give respondents the right to use Lafayette Park and the Mall as sleeping quarters. In fact, until this case, we would have thought that simple common sense would make that an unchallengable assertion. And if one then proceeds to review the various factors that are relevant to the question whether government regulation is or is not valid under the First Amendment, common sense is resoundingly confirmed: the First Amendment does not guarantee respondents the right to sleep in the Memorial-core area parks.

A. *No important First Amendment values are served by the activity respondents wished to engage in and the government sought to regulate.* We urge the Court to rule that respondents' proposal to be allowed to sleep in the Memorial-core parks does not qualify as "symbolic speech" protected by the First Amendment.[7] Further, even if sleeping is an activity that is thought somehow

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[7] See *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

to implicate the First Amendment, we ask the Court to recognize that the claim for constitutional protection is weak and weighs lightly in any constitutional balancing.

(1) The sleep-in respondents proposed for themselves does not constitute "speech"—in the everyday sense of oral or written communication—at all. Whatever might be thought about Judge Scalia's attempt in this case (see Pet. App. 78a-87a) to demonstrate that the First Amendment does not provide full protection to conduct, only speech, surely the language of the amendment at least suggests that its core concern is for such verbal communication. We start, then, with the undisputable fact that what the government wished to prohibit in this case lies at the outer margins, rather than the center, of First Amendment concerns.

(2) But the point is broader than the simple one that what respondents proposed to do was not, in a literal sense, speech at all. For we do not dispute the proposition that conduct, as well as words, can communicate—that acts can be powerful carriers of ideas. But not all conduct, not all acts, carry identical expressive power. And, on that continuum, sleep ranks very low. Few acts are less expressive in and of themselves than sleep. It is obvious to all that the wearer of a black armband or one who displays a flag with a peace symbol on it intends to communicate opinions and ideas.[8] But nobody would normally suppose that a person asleep at night is, by that act, proposing to convey a message. People sleep at night because they are sleepy and need sleep. For sleep to become the conveyor of a message, an elaborate array of further extraneous instruction and explanation is needed.

The point is, of course, relevant to the sleep-in proposed by respondents. The fact of 150 people being asleep at night in tents in Lafayette Park communicates, by itself, no ideas at all—just that these people are sleepy.

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[8] See *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969); *Spence* v. *Washington*, 418 U.S. 405 (1974).

The activity does not possess intrinsic expressive power. To convert sleep into what the court of appeals denominated as "expressive sleep," a great deal of elaborate and extrinsic explanation (illuminated placards? recorded messages broadcast on a loudspeaker?) would be required so that passersby would understand that the sleepers were sleeping in order to make a point.

In sum, even conceding the somewhat farfetched notion that sleep can, on occasion, be an activity that conveys a message, it is a remarkably unpowerful method of communication. Accordingly, a ban on sleeping in the park does not interfere with activity that is an important *form* of First Amendment activity; it does not materially impoverish the repertoire of means for the communication of ideas and opinions.

(3) The fact that sleep is not expressive unless a great deal of other surrounding and explanatory "speech" activity takes place symptomizes another relevant matter: forbidding sleep only trivially constrained the ability of these demonstrators to make their point. The permit respondents obtained left them a huge space for the exercise of First Amendment rights. They were free to come and stay on a continuous 24-hour basis, to march, and sing and make speeches. They could tell all who would listen that they were there to demonstrate that they had no home; the only thing they could not do was to add that they were "sleeping" there (rather than just "being" there) because they had nowhere else to sleep. The incremental value—the additional power—that would be imparted to their message by the fact that they could actually sleep in the park seems trivial.

(4) Finally, the fact that sleep is activity all of us constantly engage in for nonexpressive purposes, and is virtually never engaged in for expressive purposes, creates another problem if First Amendment protection is to be accorded. How are we to distinguish between expressive and nonexpressive sleep? The person who wears the black armband or displays the flag can be assumed

to be sincere when he claims that he wishes to express some message; there is no nonexpressive reason to wear a black armband or display a flag and no reason to pretend to be doing it for an expressive purpose. But in the case of conduct such as sleep, some people may claim that they want to camp in the Mall for expressive purposes when in fact they just want to camp in the Mall—and there is no way to tell one group from the other without inquiring into the sincerity of the person claiming First Amendment protection. But allowing that very inquiry to be made by a licensing authority is itself threatening to First Amendment values. On the other hand, the alternative—to allow anyone to camp in Lafayette Park who simply claims to wish to engage in expressive camping—is equally unpalatable. The dilemma illuminates the difficulties we get into if we artificialize our conception of what constitutes "expressive" conduct by extending it to quotidian activities and ordinary bodily functions that everyone engages in every day for nonexpressive purposes. In fact, a reading of the various opinions supporting the judgment below provides a painful lesson in these difficulties: none of the opinions even begins to succeed in telling us how the Park Service is to distinguish "expressive" from "non-expressive" sleep.

In sum: on every relevant scale, respondents' desire to sleep in Lafayette Park and the Mall can only marginally further the purposes of the First Amendment in protecting the people's right to communicate opinions and ideas; no important First Amendment values are implicated by a general prohibition on sleeping in these parks.

B. *The bar on using the Memorial-core parks as sleeping quarters serves important public interests and is well adapted and narrowly tailored to serve those interests while safeguarding First Amendment concerns.* Under the tests laid down by this Court in its cases passing on the validity of "time, place and manner" restrictions (see *United States* v. *Grace*, No. 81-1863 (Apr. 20, 1983)), as well as under the standard posited by *United*

States v. *O'Brien*, 391 U.S. 367 (1968), the "no camping" regulation is valid on its face and as applied.

(1) The rule that nobody is allowed to use Lafayette Park and the Mall as sleeping quarters seems so obviously sensible that it appears patronizing to provide elaborate explanation. Even assuming that every one of those demonstrators would scrupulously comply with the associated rules (no fires, no cooking, no digging of latrines, etc.), it is evident that to allow 150 demonstrators to live in these crowded areas for three months would create a significant strain on their resources and on the resources of the services charged with their maintenance and safekeeping. Indeed, respondents' proposal that they be permitted to sleep in these parks for the winter months seems to us to constitute a gross overreaching, an attempt to monopolize these unique places that are visited by millions of Americans and used by them for a multitude of different purposes.

(2) Even more important, the threat to the preservation of the beauty and serenity of these parks created by the decision of the court of appeals cannot be limited to these demonstrators and their demonstration. Under that decision, it is difficult to see how the Park Service can—without engaging in content-based inquiries prohibited by the First Amendment—resist any claim asserting First Amendment protection for using Lafayette Park and the Mall to sleep in. The point is explicitly highlighted by Judge Mikva's statement (Pet. App. 18a) that not only the homeless, but all who have a grievance against the government (such as "opposition to the nuclear arms race") have a constitutional right to sleep in Lafayette Park and the Mall. And Judge Edwards' (supposedly reassuring) suggestion (Pet. App. 39a)—that the Constitution may perhaps permit the government to institute a first-come first-served system and impose time limits—vividly (if inadvertently) conveys the nature of the threat: Lafayette Park and the Mall will have been converted into camping grounds devoted to the

project of "expressive sleeping" by all comers who wish or pretend to wish to engage in that activity.

(3) The public interest the government seeks to protect in this case—the preservation of these unique parks so as to fulfill their special and manifold purposes—has nothing to do with the suppression of communication: it is not designed to restrict speech. The National Park Service was not here engaged in suppressing supposedly dangerous or disruptive ideas (prohibition on black armbands)[9] or promoting orthodox ones (punishing those who efface patriotic slogans on license plates).[10] The regulations are wholly content-neutral; indeed—unlike regulations dealing with loudspeakers and handbilling[11]—they have almost no foreseeable effect on free expression at all. The government is, simply, trying to assert the modest notion that Lafayette Park and the Mall are not suitable for camping.

(4) The government's prohibition in this case is well-adapted and narrowly tailored to the end of preserving these parks for their unique and multifarious uses. The prohibition on sleep-overs in the Memorial-core parks is flat and uniform, not susceptible to arbitrary application and—as found by the district court (Pet. App. 96a-99a, 106a-108a)—evenhandedly applied in fact.[12] On the other hand, the regulations go far to accommodate First Amendment interests; in fact, they go well beyond the line that, in our opinion, the First Amendment commands. There were no "time or place" restrictions placed on respondents at all: they were expressly permitted to set up a 24-hour vigil and were even permitted to erect "symbolic campsites." Thus, the prohibition against sleep in no way narrowed respondents' potential audience or substantially inhibited the force of their message.

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[9] See *Tinker* v. *Des Moines School District*, *supra*.

[10] See *Wooley* v. *Maynard*, 430 U.S. 705 (1977).

[11] See *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Schneider* v. *State*, 308 U.S. 147 (1939).

[12] Cf. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969).

(5) It is true, without doubt, that allowing the demonstrators to sleep in Lafayette Park and the Mall would have made it more convenient for them to demonstrate and, perhaps, attracted some demonstrators who would otherwise stay away (or go away short of three months). But the First Amendment does not require the public to furnish demonstrators with facilities and support services designed to maximize the effectiveness of their protest.[13]

In sum: on every relevant scale, the public interest is well served—and First Amendment values hospitably accommodated—by the regulations at issue in this case, which do no more than give recognition to the fact that Lafayette Park and the Mall are not suitable for use as campgrounds.

ARGUMENT

I. NO SIGNIFICANT FIRST AMENDMENT VALUES ARE SERVED BY GIVING RESPONDENTS THE RIGHT TO USE THE MEMORIAL AREA PARKS AS SLEEPING QUARTERS

A. The Act Of Sleeping Has Such Limited Communicative Power That It Should Be Accorded Little Or No First Amendment Protection

The cornerstone of respondents' challenge to enforcement of the "no camping" regulation is that sleeping in Lafayette Park and on the Mall as part of their winter-long demonstration constitutes a form of "symbolic speech" that should be treated for First Amendment purposes as indistinguishable from conventional verbal (oral and written) communication. We submit, on the other hand, that respondents' project of sleeping in these parks does not seriously implicate the First Amendment's purpose to protect the people's right to communicate.

1. *This Court's cases show that activities such as sleep, which have minimal expressive content, should be pre-*

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[13] See *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

sumed not to qualify as "symbolic speech" for purposes of the First Amendment. The fundamental issue in this case is whether the First Amendment's guarantee of "freedom of speech" gives the respondents a constitutional right to sleep in Lafayette Park and the Mall.[14] This Court has recognized that the purpose of the First Amendment is to protect the people's right to communicate—to express thoughts and ideas and emotions—and that, consequently, non-verbal activity ("conduct") that is significantly communicative may deserve First Amendment protection as "symbolic speech." See, *e.g.*, *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969) (black armband). But the Court has firmly rejected the notion that "an apparently

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[14] Twelve years ago, in a litigation also involving the "right" to use the Memorial-core area parks as sleeping quarters, this Court apparently recognized that this issue does not present a substantial question: a neutral regulation against the use of the park for a living accommodation may be enforced without violating the First Amendment even if demonstrators wish to sleep as part of their demonstration.

In 1971, the United States District Court for the District of Columbia issued an injunction prohibiting the Vietnam Veterans Against the War from, inter alia, camping overnight on the Mall as part of a proposed demonstration. *A Quaker Action Group* v. *Morton*, C.A. No. 688-69 (D.D.C. Apr. 16, 1971). (A detailed summary of this litigation is set forth in *Vietnam Veterans Against the War* v. *Morton*, 506 F.2d 53, 56 n.9 (D.C. Cir. 1974).) The district court defined the term "overnight camping" as "sleeping activities, or making preparations to sleep (including the laying down of bedrolls or other bedding) * * *," which corresponds to the language of the current regulation. The court of appeals modified that order to permit the demonstrators to use their symbolic campsite 24 hours a day "as an incident to or as part of their public demonstrations and gatherings, and for the purpose of sleeping in their own equipment, such as sleeping bags, on that portion of the Mall." *A Quaker Action Group* v. *Morton*, No. 71-1276 (D.C. Cir. Apr. 19, 1971). The following day the Chief Justice vacated the court of appeals' order and reinstated the prohibitory order of the district court. The full court, without dissent, then upheld the Chief Justice, vacated the court of appeals' order permitting sleeping, and reinstated "with full force and effect" the injunction of the district court. *Morton* v. *Quaker Action Group*, 402 U.S. 926 (1971).

limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). See also *Spence* v. *Washington*, 418 U.S. 405, 409 (1974); *Cohen* v. *California*, 403 U.S. 15, 18 (1971); *Tinker* v. *Des Moines School District*, 393 U.S. at 515 (White, J., concurring). If respondents' proposed sleep-in does not constitute "speech" as discussed in *O'Brien*, their challenge to the "no camping" regulation must fail. It is obvious that the First Amendment is not violated by a content-neutral regulation that serves valid public interests unrelated to expression and that has no incidental impact on "speech."

a. The Court has not had occasion to draw a definitive line separating conduct that should be considered "symbolic speech" from other conduct.[15] Nor does this case require the Court to create a comprehensive formulation. Wherever the line between protected and unprotected ac-

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[15] Judge Scalia's dissent below (Pet. App. 78a-87a) suggests that full First Amendment protection, which entails a strong degree of protection against abridgment of expression even when it is incidentally caused by neutral government regulations directed at furthering interests unrelated to the regulation of expression, should be extended only to traditional forms of speech, such as spoken or written communications. He suggests that other forms of expressive *conduct* are protected only against government regulation that is directed at suppressing expression (*id.* at 78a-79a). Along similar lines, a noted constitutional law commentator has written that the distinction between "expression" and "action" is critical to First Amendment analysis and that "symbolic speech" cases must be analyzed in terms of whether the conduct is predominantly "expression" or "action." See T. Emerson, *The System of Freedom of Expression* 17-18, 79-88, 718 (1970). This distinction has been criticized as rigid and unworkable by other commentators. See, *e.g.*, Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1494-1495 (1975). Even those commentators who are critical of this distinction, however, seem to recognize that not all action is protected by the First Amendment. See, *e.g.*, Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 Harv. L. Rev. 63, 80 (1968).

tivity ultimately is drawn, it seems apparent that—if the Court's statement in *O'Brien* is to be meaningful at all—respondents' proposal to use the Memorial-core area parks as a place to sleep during the winter should not qualify as "speech" to be protected by the First Amendment.

The central point is that respondents' claim for First Amendment protection differs fundamentally from claims that have been given serious consideration by this Court in other "symbolic speech" cases. See *Spence* v. *Washington*, *supra* (affixing peace symbol to flag); *Tinker* v. *Des Moines School District*, *supra* (black armband); *United States* v. *O'Brien*, *supra* (draft card burning); *Brown* v. *Louisiana*, 383 U.S. 131 (1966) (sit-in in segregated library); *Stromberg* v. *California*, 283 U.S. 359 (1931) (flying red flag). Each of those cases involved conduct that was inherently expressive: there was no reason to engage in the conduct other than the desire to communicate, and there was no doubt that the activity conveyed a powerful message understandable to those who observed. This is vividly shown by the fact that in each case the conduct constituted the complete demonstration; there was no need, in order to communicate the ideas, to use words to explain the conduct. The reciprocal truth recognized in these cases was, of course, that—with the exception of *O'Brien* (where the challenged statute was upheld)—it was the purpose of the challenged legislative or regulatory action to restrict or regulate the expression of ideas. See *Spence* v. *Washington*, 418 U.S. at 414 n.8; *Tinker* v. *Des Moines School District*, 393 U.S. at 508-510; *Brown* v. *Louisiana*, 383 U.S. at 142; *Stromberg* v. *California*, 283 U.S. at 361, 369; see generally Pet. App. 84a (opinion of Scalia, J.).

The activity involved in this case is quite different. The fact of 150 demonstrators sleeping in tents in Lafayette Park or the Mall, standing by itself, communicates no ideas, no opinions, no emotions—only the fact that people are asleep. It is not like 150 demonstrators with flags or armbands. It is not even like 150 demonstrators standing at night in a vigil with candles lit—a demonstra-

tion obviously designed to express some sort of protest or feeling or aspiration (even if it is hard, without an explanation, to know what is its particular concern). Sleeping is a singularly inexpressive activity—it communicates primarily the bodily need to sleep.[16] It is virtually never engaged in to convey a message or make a point, and it will not be understood as conveying a message or making a point without elaborate extrinsic explanation. In fact, even if an observer understood from other indications that this was a demonstration site, he would most likely conclude simply that respondents were camping at the site for convenience, not that the act of sleeping was *itself* designed to convey a message.[17] That is why respondents could not rely on sleep alone to constitute their demonstration; the sleep was to be part of an elaborate program designed to explain their message verbally (see Pet. App. 16a-17a).

What we have here, then, is a proposed method of communication that is singularly unpowerful: without inherent expressive potential, requiring elaborate verbal

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[16] We put to one side, as not involved in this case, situations where one engages in an activity that is illegal or forbidden in order to demonstrate the invalidity or immorality of the prohibition. That is the "problem" of civil disobedience; the expressive nature of the conduct in that case comes from the fact that it is prohibited, and it is irrelevant whether the activity is otherwise expressive. Cf. *United States* v. *O'Brien, supra; Brown* v. *Louisiana, supra*. Obviously, the simple act of sitting in the forward seats of a bus is powerfully expressive, if an unjust and invalid law tells you not to do so because your skin is black. But no problem of this sort is involved here. There is no claim that respondents were seeking to protest against an unjust regulatory prohibition, and that they sought to arouse observers to *that* injustice. Thus, the legal and moral issues raised by the problem of civil disobedience need not concern the Court here.

[17] Professor Henkin, who argues strongly for an inclusive definition of "symbolic speech," seems to contemplate that the relevant conduct should be capable of becoming a "common comprehensible form of expression." Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 Harv. L. Rev. 63, 80 (1968). Sleeping obviously does not meet this standard.

explanation to convey any message at all. And the reciprocal truth is that a prohibition on this activity will have only a marginal impact on respondents' ability to convey a message and only a marginal impact on the means to be used for conveying it. For respondents are not forced to engage in verbal explanations *instead* of sleeping; they would have to explain anyway, even if allowed to sleep.

b. The plurality below obscures the weakness of the speech interest involved in this case by concluding that respondents' sleeping satisfies a "test" for First Amendment protection that it finds in *Spence* v. *Washington*, *supra* (Pet. App. 14a-15a; see also *id.* at 34a-35a (opinion of Edwards, J.)). No such test exists. In *Spence* the Court held that it violates the First Amendment to punish a person for displaying a flag with a peace symbol attached—that this was a "case of prosecution for the expression of an idea through activity." 418 U.S. at 411. The Court stressed that flags are a traditional "form of symbolism" recognized by all—a "'shortcut from mind to mind'" (*id.* at 410, quoting *Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943)). It noted that the peace symbol, too, is just that—a symbol known to all, just like the black armband that, in *Tinker*, "conveyed an unmistakable message" (418 U.S. at 410). The Court went on to state that the context of Spence's action in May 1970—at the time of the invasion of Cambodia and the tragedy at Kent State—also made the fact that he was conveying a message, as well as the content of the message, unmistakable (*ibid.*). In summarizing this part of its opinion, the Court concluded that "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it" (*id.* at 410-411).

Respondents, like the plurality below, abstract this last statement and convert it, out of context, into a "test" for the "symbolic speech" inquiry (see Br. in Opp. 20). But this statement was not designed to be a "test" at all, and

a fortiori not to be a complete one. *Spence* rested substantially on Spence's use of symbols with obvious and powerful communicative meanings. See 418 U.S. at 410. It is a giant step from this to the conduct involved here—conduct that has no recognized communicative content and that is constantly engaged in by every human on earth—but virtually never for any communicative purpose at all.[18]

In fact, this is one of the few cases where conduct alleged to be communicative cannot even satisfy respondents' own "test" for what is "symbolic speech." Respondents may have intended to convey a particular message through their sleep-in; but "the likelihood * * * that the message would be understood by those who viewed it" can hardly be characterized as "great" (418 U.S. at 411). This fact was implicitly recognized by respondents, who planned to use placards and speeches to explain the significance of their conduct, and by the plurality, which clearly recognized that these explanations would be necessary to the understanding of respondents' message (see Pet. App. 15a).[19]

c. The weakness of the speech interest at stake in this case is also demonstrated by the fact that the prohibition imposed by the government has only a trivial impact on respondents' ability to communicate their message. The National Park Service has permitted respondents to demonstrate at the times and in the places requested; nothing the government has done in any way limits their

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[18] The formulation mistakenly characterized by respondents as the "*Spence* test" has been criticized by several commentators on the ground that it is so overinclusive. Actions such as assassination of political figures and the bombing of government buildings by groups who admit responsibility can fairly be characterized as intended to convey a message that is readily perceived by the public. See, *e.g.*, L. Tribe, *American Constitutional Law* 586 n.6 (1978); Ely, *supra*, at 1495 n.53.

[19] See Note, *Symbolic Conduct*, 68 Colum. L. Rev. 1091, 1117 (1968) ("the necessity for an accompanying statement may serve to negate the communicative significance of the conduct").

audience. Respondents can speak and march and sing and pray; they can stand in silent vigil or broadcast to the world in order to convey the message of homelessness. They can even spend the night; what they cannot do is to go into their tents and spend the night actually sleeping—because that would be using the park as a place to live. It is this gap, and this alone, that leads to the claim that the Constitution has been violated, on the asserted (but surely dubious) basis that the message would be more effective if respondents were permitted actually to go to sleep in their tents.[20]

d. To summarize: our submission is that the concept of "symbolic speech" should be reserved for forms of "conduct" that can contribute meaningfully to the expressive communication of ideas, opinions and emotions; and that that concept should not be promiscuously expanded to ordinary bodily activities such as sleeping—activities that every human being engages in every day of life without intending thereby to convey a message.[21]

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[20] Even if this implausible assertion were true, it does not describe a substantial "speech" interest; it is black letter law that the First Amendment does not give one an absolute right to deliver a message in the precise manner claimed by the demonstrator to be most effective. See, *e.g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Adderley* v. *Florida*, 385 U.S. 39, 47-48 (1966).

[21] We urge the Court to adopt a presumptive rule that sleeping is not sufficiently communicative to qualify for First Amendment protection, in order to leave the door open to the (largely theoretical) possibility that there may exist some contexts in which an activity such as sleeping can convey a message with sufficient expressive power to be readily understood. A regulation designed to suppress that expression would be subject to First Amendment scrutiny even if, on its face, it affected only common activity not ordinarily classified as speech; First Amendment values are always implicated when the government seeks to suppress or regulate communication. But all that is far afield from this case: the sight of respondents sleeping in their tents cannot be said to communicate anything at all to the passerby who is not also independently and elaborately briefed by ordinary verbal means about the intended message, and there can be no serious suggestion that the "no camping" regulation is directed in any way at expression.

The First Amendment places special value on our right to *communicate*, to express what we think. The notion of a First Amendment right to engage in "expressive sleep" —the constitutional right conjured up by the court of appeals in this case—trivializes the First Amendment, because it can contribute only in a trivial way to the possibilities of human communication.

2. *Even if not categorically ruled out as a variety of "symbolic speech," sleeping constitutes activity at the margins of First Amendment concerns; since its weight in the balance is light, its regulation is valid if reasonable.* Even if this Court is unwilling to adopt a categorical presumption that sleeping is not conduct protected by the First Amendment as "symbolic speech," the considerations advanced above—showing that sleeping is a singularly unimportant form of First Amendment activity—are not irrelevant. The weakness of the First Amendment claim in this case means that, in any balancing, the weight to be accorded to the (so-called) "speech" interest is slight and is more easily counterbalanced than in cases where First Amendment values are substantially in play. This Court's decisions make it clear that, in balancing First Amendment values against the government interest in regulation, the extent to which First Amendment values are actually implicated is highly relevant, so that the degree of First Amendment protection may differ depending on the nature of the affected speech and on the form of expression involved. See, *e.g.*, *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 & n.8 (1981) (plurality opinion); *id.* at 527-528 (opinion of Brennan, J.); *id.* at 557 (Burger, C.J., dissenting); *Elrod* v. *Burns*, 427 U.S. 347, 363 n.17 (1976) (opinion of Brennan, J.); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it."); *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469, 495 (1975); *Cohen* v. *California*, 403 U.S. 15, 18 (1971). What this means, in effect, is that the marginal

First Amendment values involved in this case can be fully protected without subjecting the government's regulatory enterprise to the sort of exacting scrutiny that is conventionally called for when the government regulates truly communicative activity.

In part II of this brief, we show that in fact the public interest in enforcing the National Park Service's ban on sleeping in Lafayette Park and the Mall is substantial. But first we explain why the court of appeals' approach to the question whether "speech" was involved in this case at all (and, if so, what sort of speech interest was involved) is fundamentally flawed.

B. The Court Of Appeals' Overinclusive Approach To What Constitutes "Symbolic Speech" Is Analytically Flawed And Contradicts This Court's Cases

The opinions in the court of appeals struggle mightily—but, we submit, unsuccessfully—to show that what is at stake here—the right of respondents to spend three months camping in Lafayette Park and the Mall—constitutes a significant speech interest within the meaning of the Constitution.

In analyzing the question whether—and what sort of—"speech" interest is involved in this case, the court of appeals was led to overinclusiveness by at least four significant errors in its analysis.

1. As we have already demonstrated (see pages 23-24, *supra*), the court was led to an unduly broad definition of protected speech by its mistaken adoption (see Pet. App. 15a), as a wooden "test," of a standard derived from one sentence taken out of context from the opinion in *Spence* v. *Washington*, *supra*.

2. The court of appeals went further astray in applying this overinclusive "test." Having quoted the Court's statement in *Spence*, the plurality made no inquiry into the question whether there is a "great likelihood" that respondents' plan to sleep in the parks would in fact be readily perceived as communicative. Rather, the plurality

immediately jumped to the conclusion that "[i]n the present case, within the context of a large demonstration with tents, placards, and verbal explanations, the communicative context is sufficiently clear that the participant's *sleeping cannot be arbitrarily ruled out of the arena of expressive conduct*" (Pet. App. 15a (footnotes omitted; emphasis supplied)).

It is apparent that this approach sweeps all before it: conduct can be excluded from the category of "expressive conduct" only if it is permissible to rule it out "arbitrarily." But what conduct is that? And is it not the case that literally any conduct, when explained with "placards and verbal explanations," can, on this approach, be rendered sufficiently "communicative"?

This Court made it unmistakably clear in *O'Brien* that not all conduct may be labeled "speech" simply because the actor intends thereby to convey a message. The court of appeals (Pet. App. 13a) paid lip service to this injunction, but deprived it of all meaningful content in concluding that the First Amendment protects as "speech" all conduct which, when explained by placards and verbal explanations, is sufficiently understandable to resist being "arbitrarily" excluded from the "arena of expressive conduct."

3. The court of appeals does not stop here. Judge Mikva's opinion further expands the concept of speech by eliminating the requirement that the conduct in question have any inherent communicative value at all (Pet. App. 17a):

> We add, moreover, that even were we not to focus on the peculiarly expressive nature of sleeping, first amendment scrutiny would still be implicated. This conclusion stems from the fact that the protestors' purpose, whether asleep or awake, is to maintain 'a symbolic [24-hour] presence * * *.' * * * Given this undeniable intent * * * it is clear that CCNV's proposed 'presence' is intended to be expressive regardless of whether the demonstrators sit down, lie down,

> or even sleep during the course of the demonstration. Thus, whatever the particular form of the protestors' presence at night, their presence itself implicates the first amendment.

Apparently, then, protestors who wish to demonstrate around the clock have a constitutionally protected right to engage in any activity necessary to enable them to stay around the clock, regardless of whether the activity itself conveys a message. See also Pet. App. 47a (opinion of Ginsburg, J.).[22] And the plurality makes it explicit that camping in the park is a constitutional right no matter what the purpose of the demonstration (*e.g.*, to protest the nuclear arms race), so long as the protestors deem an around-the-clock presence to be important (and therefore "expressive") (*id.* at 18a). But this principle cannot, of course, be limited to sleeping. Under it a right to cook and serve food—for example—must plainly be classified as a First Amendment right so long as it bears a "functional relationship" (*id.* at 47a (opinion of Ginsburg, J.)) to the demonstrators' around-the-clock expressive presence.

4. The court of appeals made one other fundamental error. Having once found that, in the circumstances, respondents' proposed camping constituted "speech" within the coverage of the First Amendment, the court immediately brought into play the doctrines providing for highly rigorous scrutiny of governmental regulation of speech—just as if the government had, here, prohibited respondents from making ordinary speeches and passing out leaflets in the park (cf. Pet. App. 45a (opinion of Ginsburg, J.) (voicing misgivings about treating sleeping as the equivalent of ordinary speech)). Having found that respondents have a toe-hold on the "speech" side of the scale, the court went on to evaluate the "government interest" side of the scale as if all speech interests had an

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[22] Chief Judge Robinson and Judge Wright disassociated themselves from this aspect of the plurality opinion. See Pet. App. 31a.

identical weight, without inquiring into the seriousness of the constraints on communication created by the ban on sleeping.

Ignoring the strength of the speech interest involved is surely a peculiar way of engaging in what the court of appeals correctly termed a *balancing* of First Amendment freedoms against the government's interest in regulation. See Pet. App. 19a; see generally L. Tribe, *American Constitutional Law* 581-582, 683 (1978); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. at 502 (plurality opinion); *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 91 (1977); *Konigsberg* v. *State Bar*, 366 U.S. 36, 50-51 (1961). One cannot balance without assessing the weights on both sides of the scales. Particularly if "speech" is to be defined on the undiscriminating basis adopted by the court of appeals, so as to include virtually every sort of conduct, it is critically important that distinctions between different forms of speech—carrying vastly different First Amendment weights—be kept in mind in evaluating whether a sufficient countervailing interest has been shown to justify regulation.

In conclusion, we submit that this is not a difficult case. No important First Amendment values are served by inventing a constitutional right for respondents to sleep in Lafayette Park and the Mall; the fact that respondents may not sleep there is not a significant intrusion into the free marketplace of ideas. Even if respondents' sleep-in triggers some First Amendment scrutiny, the substantial public interest in the "no camping" regulation—to which we now turn—clearly justifies enforcing it.

II. THE BAN ON CAMPING IN THE MEMORIAL PARKS SERVES A SIGNIFICANT PUBLIC INTEREST AND DOES NOT THREATEN FIRST AMENDMENT VALUES

A. Under This Court's Balancing Test The "No Camping" Regulation Is Amply Justified As A Content-Neutral Measure Narrowly Tailored To Serve An Important Public Purpose Unrelated To The Suppression Of Free Expression

Perhaps the most important aspect of the "no camping" regulation is not what the regulation does, but what it does not do. This Court has stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). See also *Carey* v. *Brown*, 447 U.S. 455, 470 (1980). The regulation at issue here is in no way directed at expression.[23] It must, therefore, be common ground that the regulation is not subject to the strictest form of First Amendment scrutiny; it need not be supported by a "compelling state interest." See, *e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 786 (1978). Rather, the challenge to the regulation—based on its alleged incidental intrusion into rights of free expression—must be evaluated by balancing the government interest served by enforcing the regulation against the speech interest allegedly infringed. See generally L. Tribe, *American Constitutional Law*, 580-584, 682-684 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1484, 1488-1490 (1975).

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[23] The fact that the interest underlying the regulation is unrelated to expression is alone sufficient to distinguish this case from *Spence* v. *Washington*, *supra*, where the Court expressly found that the only conceivable justification for the statutory restriction was to regulate expression. 418 U.S. at 414 n.8; see also *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 541 n.10 (1980).

Two lines of cases suggest an appropriate framework for conducting this balancing inquiry. Lafayette Park and the Mall are concededly "public forums" appropriate for use for the public communication of ideas. The limits on the government's power to regulate expression in a public forum are well established. The government "may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *United States* v. *Grace*, No. 81-1863 (Apr. 20, 1983), slip op. 5 (quoting *Perry Education Ass'n* v. *Perry Local Educator's Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 7-8).[24] This doctrinal framework is appropriate here because the "no camping" regulation—if it has any impact on expression—clearly regulates only its manner. Pursuant to the regulations, respondents have been issued a permit entitling them to demonstrate in the parks. But the manner in which they may demonstrate is restricted—they are not permitted to express their message by using their demonstration site as sleeping quarters.

The court of appeals looked to a different line of authority in considering the validity of the regulation. It applied the test set forth in *United States* v. *O'Brien*, *supra*. *O'Brien* involved the prosecution of a person for publicly burning his draft card on the courthouse steps, thus violating a federal statute prohibiting the knowing destruction of draft cards. Assuming arguendo that O'Brien's conduct was protected "speech," the Court stated (391 U.S. at 377):

> [W]e think it clear that the government regulation is sufficiently justified if it is within the constitu-

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[24] See also *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981); *id.* at 136 (Brennan, J., concurring in the judgment); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. at 647-648; *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. at 535-536; *Grayned* v. *City of Rockford*, 408 U.S. 104, 115-119 (1972).

> tional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The Court held that this test was met and affirmed O'Brien's conviction, emphasizing that "both the governmental interest and the operation of the [statute] are limited to the noncommunicative aspect of O'Brien's conduct" (*id.* at 381-382).[25]

We believe that the language quoted from *Grace* and *O'Brien* indicates a convergence toward a single framework for inquiry. Both cases insist, first, that the regulation not constitute censorship—that it be content-neutral (*Grace*) or not have as its purpose the suppression of free expression (*O'Brien*). Second, both cases ask whether the public interest served by the regulation is "important or substantial" (*O'Brien*) or "significant" (*Grace*). Third, both cases require that the government regulation be well adapted so as to "further" the relevant government interest, and that the regulation not intrude with unnecessary breadth into the arena of free expression. *Grace* puts the point by stating that the regulation must be "narrowly tailored" to serve the government interest, and then adds the congruent injunction that alternative channels of communication must be left open. *O'Brien* states the "narrowness" requirement by insisting that the restriction on speech may not be "greater than is essential" to serve the government's interest.[26]

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[25] The Court explained that "the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies" (*id.* at 381), and that a law prohibiting the destruction of draft cards "specifically protects this substantial government interest" (*ibid.*).

[26] We do not believe that the *O'Brien* "no greater than is essential" test requires the government to do more than to demonstrate

We turn now to a detailed analysis of this case within this framework, an analysis that demonstrates that under this Court's cases the ban on camping in the Memorial-core parks is constitutional.

1. *The regulation is a content-neutral nondiscriminatory prohibition wholly unrelated to the suppression of expression.* No elaborate demonstration is needed of the undisputed point that the government's age-old policy against overnight camping in Lafayette Park and the Mall has nothing to do with censorship and is in no way animated by the purpose of suppressing free expression. The government has not decided here that some or all ideas are dangerous, or that some ideas are better than others. Indeed, it requires considerable ingenuity to figure out how the government's regulation has in any way intruded on free expression; the more natural reaction would be to say that respondents' demonstration was accorded a remarkably generous welcome. Respondents were given permission to demonstrate around the clock in a small and fragile area revered by Americans and belonging to all, at the center of the symbolic heart of

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that the regulation is "narrowly tailored" to serve a significant government interest. This is shown by the way in which the Court applied that test in *O'Brien* itself when it upheld the challenged statute as an "appropriately narrow means of protecting" the government interest in maintaining the availability of draft cards (391 U.S. at 382). In a later case the Court has paraphrased the *O'Brien* test in terms indistinguishable from the "time, place, and manner" formulation, stating that "the regulation must be *narrowly drawn* to avoid unnecessary intrusion on freedom of expression." *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 69 n.7 (1981) (emphasis added). Indeed, the Court apparently has classified *O'Brien* as indistinguishable from other "time, place, and manner" cases. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Because it applies only to enactments that are "unrelated to the suppression of free expression" (391 U.S. at 377), it makes no sense for the *O'Brien* test to incorporate an extremely strict degree of scrutiny. See generally *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. at 540 n.9; Ely, *supra*, at 1484-1485; L. Tribe, *American Constitutional Law* 685 (1978) ("relaxed scrutiny").

the city and the country. Their audience would be exactly the audience they themselves chose to have. All that has happened is that respondents were not allowed to use their demonstration site as sleeping quarters.[27]

Nor does the structure of this regulation invite content-based or discriminatory enforcement: the ban on sleeping in the park is flat and absolute, leaving no room for discretionary judgments about the supposed dangers of particular communications. Cf. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969); *Kunz* v. *New York*, 340 U.S. 290, 293-294 (1951); *Cantwell* v. *Connecticut*, 310 U.S. 296, 304-307 (1940).[28]

2. *The regulation serves an important government interest—the preservation of the parks for multifarious uses.* Lafayette Park and the Mall—integral parts of the Memorial-core—constitute a special national resource. The National Park Service discharges an important mission in administering these parks and regulating their use for the benefit of the general public. As is explained in detail in the policy statement accompanying the 1982 revision of the "no camping" regulations (47 Fed. Reg. 24299, 24301-24302), these particular regulations are an essential part of the overall regulatory scheme to preserve park resources for the enjoyment of all.

In the judgment of the National Park Service, the Memorial Core area parks are "an especially unsuitable location for camping activities" (47 Fed. Reg. 24302 (1982)). These are small urban parks, visited by mil-

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[27] We repeat—see note 20, *supra*—the point that even if the ban on sleep reduces the effectiveness of respondents' message (a dubious proposition), no violation of the First Amendment occurs; the Amendment does not guarantee an individual the right to engage in what he considers to be the most effective way to communicate. See, *e.g.*, *Heffron* v. *Society for Krishna International Consciousness, Inc.*, 452 U.S. at 647.

[28] The district court unequivocally rejected the suggestion that the regulation has been enforced in a discriminatory fashion (Pet. App. 106a-108a), and none of the judges on the court of appeals took issue with that portion of its holding.

lions yet meticulously landscaped, unable to accommodate long stays. The use of these parks as campgrounds would be "basically incompatible" with their important natural functions. See *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 75 (1981) (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 116-117 (1972)). As described in the relevant policy statement, "[c]amping could cause significant damage to park resources, create serious sanitation problems, and seriously tax law enforcement resources." 47 Fed. Reg. 24302 (1982).

In addition, allocating park lands to individuals for use as living quarters excludes others. The Memorial-core parks are small. They are used by multitudes, both residents and visitors,[29] who come to see and stroll and play and pray. Some of these seek not noise and conflict but serenity and inspiration. The rights of *all* must be accommodated. In these circumstances, the notion that a portion of Lafayette Park and the Mall should become living space for respondents for the three winter months seems completely out of proportion, and would—as the Park Service has determined—deprive "other park visitors * * * of use of this nationally significant space." 47 Fed. Reg. 24302 (1982).

Further, it must be remembered that the government interest involved in this case is not limited to these respondents and their demonstration. If respondents have a constitutional right to engage in "expressive sleep," so do others. And, as a reading of the opinions in the court of appeals shows, the question of how to distinguish between "expressive" and "non-expressive" sleep is not easily answered. In fact, as Judge Wilkey demonstrates (Pet. App. 71a-77a), there is no way for the National Park Service to draw a line that would permit "sleeping demonstrations" without leaving it effectively powerless to prevent anyone from using Lafayette Park and the Mall as sleeping quarters.

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[29] It has been estimated that, by 1985, 29 million people will visit the Mall annually. *History of the Mall, supra*, at 98.

It is a fundamental principle under the First Amendment the government should not use content as a basis for regulating speech or expression. See, *e.g.*, *Police Dep't of Chicago* v. *Mosley*, 408 U.S. at 95; *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951). Many demonstrators—indeed, many casual visitors to Washington—may have an interest in camping on the Mall.[30] It is a simple matter for anyone to assert a facially valid First Amendment claim to sleep there, one that would plainly satisfy the plurality's test for constitutional protection.[31] The National Park Service would be forced to grant per-

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[30] The plurality states that not many people are interested in camping on the Mall in the dead of winter (Pet. App. 24a). But the decision in this case must obviously be more than a winter's tale; a constitutional right to sleep in the park can hardly be limited to cold times.

[31] The plurality states that demonstrators wishing to use the parks as sleeping quarters "should be held to no higher standard than the advancement of a plausible contention that their conduct is intended to, and in the context of their demonstration likely will, express a message" (Pet. App. 16a). Given the plurality's conclusion that sleeping can be treated as expressing a message because it facilitates the demonstrators' "presence" at the demonstration site, it will be a rare demonstrator who is unable to meet this standard. Even if it is required that the sleeping itself be expressive (see Pet. App. 31a (opinion of Robinson, C.J. and Wright, J.)), it would not be difficult for campers to concoct a facially valid First Amendment justification. As Judge Wilkey notes (Pet. App. 74a-77a), groups might propose to camp on the Mall to protest the high cost of hotel accommodations in Washington or to dramatize the absurdity of the court of appeals' decision in this case. Applications for permits to engage in camping for these reasons would meet the court of appeals' standard and presumably would have to be granted by the National Park Service. Respondents' characterization of these First Amendment claims as "frivolous" (see Pet. App. 74a) provides no solution. That is a judgment on which reasonable persons may differ; some persons might well characterize in the same terms respondents' own claimed First Amendment right to sleep. Cf. Pet. App. 78a, 87a (opinion of Scalia, J.). The point is that it is not the National Park Service's business, nor should it be, to examine the content of proposed demonstrations and to assess whether they are "frivolous."

mits to these individuals to sleep in the park unless it is to investigate the permit requests to determine whether the First Amendment claim is sincere. Such an inquiry—in addition to being beyond the scope of the Service's proper function—would seriously threaten First Amendment values. It would require the government to assess the motivations of demonstrators and to make judgments about the plausibility of the connection between the proposed camping activity and the message sought to be conveyed.[32] It is, consequently, clear that the government interest involved in this case cannot be limited to the protection of the parks from the effects of the demonstration proposed by these respondents. Rather, the question is whether there is a significant public interest associated with preventing Lafayette Park and the Mall from being converted into places available for use as around-the-clock campgrounds by all comers who wish to use them for living accommodations for their convenience or pleasure and who present a facially valid claim to be allowed to engage in "expressive sleep." Our submission is that the answer must be "yes"; that to allow this to happen would be tragic; and that the notion that the Constitution requires it to happen is absurd.

3. *The regulation is well adapted to serve the relevant government interests and is narrowly tailored to be no wider than necessary; the regulation leaves ample scope for free expression.* It is the use of the parks as living quarters that the Secretary of the Interior has identified as threatening the preservation of park resources. The regulation is narrowly focused to that end. "Camping" is defined as "the use of park land for living accommodation purposes." 36 C.F.R. 50.27(a). The inclusion

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[32] The plurality casually states that "[i]t would seem an entirely permissible distinction to permit sleeping that is expressive as part of a twenty-four hour vigil, but not to permit sleeping that is a mere convenience to daytime demonstrators" (Pet. App. 25a). How the National Park Service is actually supposed to draw this distinction on the basis of permit applications is left to the imagination.

of sleep as one of the acts associated with use of the park as a living accommodation—the portion of the regulation attacked by respondents—is surely appropriate. Sleeping outdoors is a central constituent of camping—it's what it's all about. What converts an outing or a hike or a picnic into camping is the project of *living* outdoors; living outdoors means to sleep there. A definition of camping that failed to include sleeping would be bizarre.[33]

The inclusion of sleep in the definition of camping directly serves the public interest in protecting park resources. It makes it more difficult to maintain a continuous presence in the park, to occupy it around the clock. The parks are not closed at night, and the regulations (and the permit issued here) interpose no bar to an around-the-clock demonstration. As Judge Wilkey explains (Pet. App. 67a n.49, 74a-75a), there is a significant quantitative difference, in terms of the threat to park resources, between permitting a wakeful vigil and permitting demonstrators to use the park as a place to sleep. Both involve a continuous, around-the-clock presence in the park; but once sleeping is allowed, the number of persons who can stay for 24 hours is greatly increased, with a corresponding increase in the wear and tear on park resources.

As we have already shown, the regulation as written and applied is scrupulously restricted to interfere minimally (if at all) with respondents' right to propagate a message. See pages 24-25, 34-35, *supra*. Respondents have been permitted to maintain a 24-hour presence. They have been permitted to erect "symbolic" campsites so that they can demonstrate that the point of their protest is homelessness. Their right to communicate by real First

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[33] It should be noted that the regulation does not prohibit sleep as such; it focuses only on sleep that manifests a purpose to use the park land for living accommodation purposes. Napping that occurs outside of this context is not prohibited. See 47 Fed. Reg. 24301 (1982).

Amendment activities—word and song, speech and writing—is inviolate. Under the circumstances the asserted infringement on their ability to communicate their message seems more theoretical than real.

Finally, as has also been previously shown (pages 36-38, *supra*), and as is fully elaborated in Judge Wilkey's dissent (Pet. App. 71a-77a), the "no camping" regulation cannot be criticized as overbroad because it fails to provide an exception for "expressive" sleeping. The short answer to such criticism is that any such exception would either wholly swallow the rule, or would inevitably engulf the Park Service—and the courts—in generating and applying content-oriented lines for distinguishing between expressive and nonexpressive sleep.

We conclude, therefore, that—whether the *O'Brien* formulation or the standard "time, place, and manner" test is used—the flat ban on camping in the Memorial parks is valid.[34]

B. The Court Of Appeals Failed Properly To Evaluate The Government Interest In Preventing Camping In The Memorial Area Parks

The court of appeals majority was not persuaded that, as applied in this case, the "no camping" regulation sufficiently and narrowly serves a significant public interest. But in reaching that conclusion the three principal opinions supporting the judgment below mischaracterize and distort the nature of the government interest at stake here. Each of those opinions placed heavy emphasis on the fact that the government has *not* prohibited respond-

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[34] The point can be put in the precise language of *O'Brien*: "[B]ecause of the Government's substantial interest in * * * [prohibiting use of the parks for living accommodation purposes], because [a ban on camping] is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of [respondents' proposal to live in the park] frustrate[s] the Government's interest, a sufficient governmental interest has been shown to justify [the regulation]." See 391 U.S. at 382.

ents from holding their demonstration, from maintaining a 24-hour presence in the parks, from erecting symbolic campsites, and even from lying down and taking catnaps in these symbolic tents. But instead of commending the government for the narrowness of the resulting prohibition, the opinions turn the permissive features of the regulations against the government. Judge Mikva focuses on the "incremental" harm to the parks that can be caused by these specific demonstrators (who have received a permit to demonstrate around the clock and to erect tents) if they also engage in the "incremental" act of falling asleep in their tents. He concludes that no serious additional mischief will be caused by sleeping (Pet. App. 21a-24a). Judge Ginsburg complains that "it is not a rational rule of order to forbid sleeping while permitting tenting, lying down, and maintaining a twenty-four hour presence," and concludes that the lines drawn by the National Park Service are not sufficiently "sensible, coherent, and sensitive to the speech interest involved" (*id.* at 48a). Judge Edwards takes a different tack. His question is whether there are alternative, less restrictive, means available to achieve the purpose of the "total ban against sleeping"—a ban that, Judge Edwards asserts, counts as a "total prohibition on the exercise of a constitutional right" (*id.* at 38a). He concludes that less restrictive alternatives are available that would adequately serve the relevant government interests (*id.* at 39a).

We believe that the methods of analysis used in these opinions are flawed and ignore the relevant commands of this Court's cases.

1. *The court of appeals misunderstood the point of the government's regulations and therefore mischaracterized the government interest involved in this case.* The government in this case seeks to prevent persons from camping—that is, using the parks as living quarters. It is that use that is considered most threatening to the proper utilization and preservation of these spaces. The regulations consequently do not forbid many activities that are *not*

constituents of camping—activities such as strolling, sunbathing, and lying down. In fact the regulations do not prohibit sleeping as such—they prohibit sleeping in the context of using the park as a place to live. (That is why catnapping is not prohibited.)[35]

The court of appeals never addressed the question whether it is "important" (Judge Mikva) or "sensible" (Judge Ginsburg) to forbid the use of Lafayette Park and the Mall as a living accommodation, and whether it is possible and meaningful to do that without denying respondents the right to sleep overnight in their tents. Instead, it disaggregated the government's prohibition and examined in isolation the one specific constituent of that activity—sleeping—that respondents sought to include in their demonstration. This distorted its analysis and enabled it to invalidate the regulation by a technique of "divide and conquer." Obviously, the "incremental" harm caused by one narrow element necessary to carry on a complicated activity can be easily minimized even though the activity as such is significantly harmful. The question still remains whether forbidding the activity is or is not important. What the government seeks to prevent here is the monopolization of and strain on park resources that results from the continuous and intense use that we call "camping" or "living" in a place—a use that cannot occur without sleeping. It is simply irrelevant to the validity of that aim that sleep—as such—is not a

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[35] The question whether it is "important" or "sensible" to prohibit sleeping (in the abstract) while allowing catnapping (in the abstract) is, consequently, an irrelevant and artificial question. The National Park Service has concluded that using the park as living quarters—including, in that context, sleeping—is more threatening to and less appropriate for Lafayette Park and the Mall than the taking of an occasional casual snooze. This seems like an eminently sensible judgment; and it is unaffected by the fact that sleeping and catnapping seem alike in the abstract and that in any one case the additional "harm" to the park from allowing the snoozer to spend the night asleep seems small.

"harmful" activity,[36] or that forbidden sleep is not significantly different—in the abstract—from permitted wakeful lying down or catnapping.

2. *The importance of the government's "no camping" regulation is not diminished by the fact that the government has been sensitive to First Amendment interests in its generous treatment of respondents' proposed demonstration.* The question that remains—if, in principle, there is a substantial government interest in preventing persons from "living" in Lafayette Park and the Mall—

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[36] In fact, the court of appeals is wrong even in the context of its own analysis. Not many people are up to the austerities of all-night vigils. But allowing people to sleep overnight in tents will multiply their numbers and will allow each one to stay longer. Obviously this will create new and heavy pressures on the resources of Lafayette Park and the Mall. (The court of appeals' plurality stated that "allowing an all-night presence by wakeful protestors would seem to tax sanitation facilities, law enforcement personnel, and the park resource itself to a greater extent than would allowing those same protestors simply to sleep" (Pet. App. 23a). This evidently assumes that giving permission to sleep will have no effect on the number of persons using the park around the clock and no effect on how long such a person will remain there.) From the viewpoint of the proper use of these parks, it makes no sense whatever to promulgate a rule that camping is prohibited in Lafayette Park and then to provide—as the court of appeals in effect did—that camping is nevertheless permitted as long as the campers promise to cook elsewhere.

In fact, the "divide and conquer" tactics inherent in the court of appeals' "incremental" analysis portends ill also for the remaining elements of the Park Service's regulations. If respondents have a constitutional right to sleep in the park, they can surely make the same claim next year for the right to cook and store their possessions there (a case of "expressive" cooking and storing to demonstrate that they have no home in which to cook and store their possessions). And the court of appeals is unlikely to find that a substantial "incremental" governmental interest is served by preventing demonstrators (who are, by hypothesis, spending the nights exercising their constitutional right to sleep in Lafayette Park) from cooking there and from storing their things in their (no longer) "symbolic" tents.

is whether the Constitution demands that that rule be abandoned in the case of demonstrators who have been given permission to stay around the clock and to erect symbolic tents. The court of appeals' conclusion that the regulation is invalid *because* the government has gone to these lengths to accommodate First Amendment values seems peculiarly perverse: it tells the government to be as stringent as possible in dealing with demonstrations, permitting only what the Constitution inexorably commands. It is made doubly perverse by the fact that the permitted activities that the court of appeals found so significant have been permitted in part on account of requirements imposed by prior decisions of that very court.[37] In effect what the court of appeals has done here is to hold (in Case 1) that the law requires the government to permit demonstrations around the clock and the erection of symbolic tents, and then to hold (in Case 2) that sleeping must be permitted because a 24-hour presence and tenting are allowed—on the ground that the "incremental" harm caused by the "incremental" act of sleeping is not great (Judge Mikva) or that the line between tenting and sleeping is not "sensible" (Judge Ginsburg). It is this technique that Judge Wilkey correctly characterized as one that "nickel[s] and dime[s] [the] regulation to death" (Pet. App. 64a).

Even more important, the court of appeals' analytical technique is not a sound way to create rules of constitu-

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[37] The regulations authorize the use of temporary structures such as symbolic tents in line with the decision in *Women Strike for Peace* v. *Morton*, 472 F.2d 1273 (D.C. Cir. 1972), and a settlement of litigation in that case. 36 C.F.R. 50.19(e)(8). By the same token, respondents were permitted to remain in the park without time restrictions as part of their demonstration in part because of the court of appeals' prior recognition of a First Amendment right to conduct an around-the-clock vigil. See *United States* v. *Abney*, 534 F.2d 984 (D.C. Cir. 1976); see also *A Quaker Action Group* v. *Morton*, 516 F.2d 717, 734 (D.C. Cir. 1975) (striking down existing limitation on length of demonstrations).

tional law. The question in this case is whether the *Constitution* gives respondents the right to use the Memorial-core parks as sleeping quarters. The fact that the government has—rightly or wrongly—chosen to allow 24-hour vigils and "symbolic" campsites should not distort the correct disposition of that question. Permissions and concessions granted by government officials should not be converted into baseline touchstones for constitutional adjudication.[38]

In fact, of course, the government has never in any way conceded or assumed that the provisions of the regulations allowing around-the-clock demonstrations and the erection of symbolic campsites are required by the Constitution. The regulations are framed as they are because the government, in an attempt to be hospitable to First Amendment values, determined to accede without further litigation to the requirements imposed in previous circuit cases. Their rulings should not be deemed to provide the constitutional starting point for the decision of this case.

3. *The court of appeals' plurality also misconceived the nature of the government's interest in enforcing the "no camping" regulation by focusing entirely on these particular demonstrators.* The plurality in this case further narrowed its focus in evaluating the nature and weight of the public interest behind the "no camping" regulation by reducing the issue to that presented by these specific demonstrators and their particular demonstration. Its ultimate holding was that the government's interest would

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[38] Nor will it do to conclude that it is not "sensible, coherent, and sensitive" to draw a distinction between tenting and sleeping (Pet. App. 48a (opinion of Ginsburg, J.)). No provision of the Constitution gives the courts a general reviewing power to invalidate regulations because a judge feels they are based on distinctions that are not sufficiently "sensible, coherent, and sensitive."

not be sufficiently furthered "by keeping *these* putative protestors from sleeping" (Pet. App. 28 (emphasis added)). But in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981), this Court explained that the justification for a regulation of general applicability cannot be assessed by inquiring into the effect of granting an exemption from the regulatory prohibition to one group. Any regulation can be made to seem unnecessary if the inquiry is focused only on the government interest in not making an exception in the particular case at hand. See, *e.g.*, *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 135 (1981) (Brennan, J., concurring). The plurality acknowledged this in theory (see Pet. App. 22a), but it evaded meaningful compliance with the rule by adopting an artificial definition of the relevant "general" category.[39]

We submit that this analysis is unsound. The National Park Service is under a duty to promulgate general regulations for the preservation of park resources. Surely it must be free to act with the generality of cases in mind without thereby rendering the regulation vulnerable in every individual situation in which a compelling need for the particular restriction cannot be shown. See, *e.g.*,

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[39] The plurality never made a meaningful attempt to analyze the category of persons who would be entitled to sleep in the park as a result of its ruling. Instead it stated that the government's interest in enforcing the regulation is to be assessed in terms of its impact on "all individuals or groups similarly situated to [respondents]," defined as "all those who wish to engage in sleeping as part of their demonstration and have been granted renewable permits to demonstrate on a twenty-four hour basis on sites at which they have been allowed to erect temporary symbolic structures" (Pet. App. 22a). The plurality justified this artificial (and essentially circular) focus on the basis of the dubious assertion that "[t]he interests of people who do not possess a permit are simply not at issue in this case" (*ibid.*). It is clear that the plurality assumed that the relevant category was very small.

United States Postal Service v. *Council of Greenburgh Civic Associations*, 453 U.S. at 132-133. Otherwise, challenges to the regulations would lead to chaos and arbitrary treatment, rather than uniformity, fairness, and ease of administration. Since the regulating agency must draw lines, the court's inquiry must focus on whether those lines, drawn for the generality of cases, are reasonably (and narrowly) tailored to serve the relevant government interest. That standard is satisfied here. The government has a strong interest in preventing all comers from camping in Lafayette Park and the Mall by using them as living quarters. It makes no sense to forbid camping without forbidding its central necessary constituent: sleeping overnight in tents. No intelligible exception can be carved out for "expressive" camping, and no special exception can or should be made for these particular demonstrators.

4. *The court of appeals misapplied* O'Brien *when it concluded that less restrictive alternatives are available.* A further flaw in the court of appeals' approach to this case resulted from its misunderstanding of this Court's statement in *O'Brien* that an incidental restriction on First Amendment freedom may be "no greater than is essential to the furtherance of that [governmental] interest" (391 U.S. at 377). Both the plurality and Judge Edwards read this as authorizing the courts to make a wholly independent de novo assessment whether there exists a means "less restrictive" than the regulation to further the government's objective (Pet. App. 23a, 39a). Both opinions conclude from this that the regulation must fall if the court can conceive of a somewhat different regulatory scheme that may be protective of the parks even if respondents are permitted to sleep there. The plurality suggests that patrolling the campsites closely to prevent cooking and making fires (*id.* at 23a-24a), revoking the demonstration permit if "participants engage in non-sleep 'camping' activities" (*id.* at 26a n.32), and limiting "the number of tents, the size of tents or

campsites, and the number of persons allowed to sleep" (*id.* at 27a (footnotes omitted)) constitute less restrictive alternatives. Judge Edwards also lists these as alternatives, and adds that the Park Service may "perhaps prevent any individual from sleeping in the parks beyond a specified, successive number of hours or days" (*id.* at 39a).

Our submission is that *O'Brien* does not contemplate this kind of ad hoc regulatory supervision over the details of an administrative scheme. In fact this Court has warned that "[t]he logic of * * * elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all [regulatory] powers" (*United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976)), since "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation" (*Illinois Elections Board* v. *Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring)).[40]

Whatever scrutiny may be appropriate when the government seeks to regulate or limit expression, it is clear that in cases like this one (and *O'Brien*)—where the challenged regulation is "unrelated to the suppression of free expression" (*United States* v. *O'Brien*, 391 U.S. at 377)—government regulation should not be vulnerable to the free-floating judicial revision exemplified in the approach of the court of appeals.[41] It is the Secretary of

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[40] On the analysis adopted by the court of appeals, the conviction in *O'Brien* itself would surely have been reversed, for the smooth functioning of the draft could have been assured by more systematic government record-keeping without prohibiting the expressive activity of burning draft cards. See Ely, *supra*, at 1487-1488.

[41] As we have already suggested (see note 26, *supra*), we read the fourth prong of the *O'Brien* test as the equivalent of one aspect of the familiar "time, place, and manner" test—that government regulations that incidentally impinge on speech must be "narrowly tailored" to accomplish their intended purpose. The government may not use an elephant to swat a fly. But the *O'Brien* test was

the Interior, and not the court of appeals, that has been entrusted with the responsibility to formulate the regulations designed to safeguard the Memorial parks for their multifarious uses. Every Secretary seized of the question has concurred that it is sensible to bar all camping in these parks. The suggestion that the purposes of that bar would be adequately served by the "close patrol" of camping sites and the initiation of permit-revocation procedures if illegal cooking is discovered seems to us mistaken;[42] but in any event, the matter is one for prudential judgment, not constitutional adjudication.[43]

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not intended to give the courts the power to decide that a fifteen inch flyswatter must be used rather than a sixteen inch one because it is "less restrictive." The question for the court is whether the government has adopted a regulatory scheme that fairly and substantially matches ends and means, not whether the court can conjure up a set of detailed regulations that, in the court's opinion, are a shade more liberal than the government's.

[42] In adopting the existing regulation, the National Park Service found that "[e]xperience with administering the court's decision [in *CCNV I*] allowing sleeping has revealed that sleeping activity by demonstrators expands to include other aspects of living accommodations such as the storage of personal belongings and the performance of necessary functions which have converted the sleeping area into actual campsites." 47 Fed. Reg. 24301 (1982). There is no reason to be confident that respondents' demonstration will be an exception. When respondents conducted their similar, much smaller, "model" demonstration in the winter of 1981-1982, their "expressive sleep" (Pet. App. 26a) not surprisingly spilled over into other camping activities specifically proscribed by the regulations. The district court found that respondents hung blankets over trees in Lafayette Park and consumed food and stored personal belongings at the demonstration site (Pet. App. 96a).

[43] Indeed, one wonders why Judges Mikva and Edwards assumed so easily that rules limiting the numbers of tents and tenters and the duration of their demonstrations would be *less* restrictive than a rule prohibiting sleeping. (Compare Pet. App. 47a-48a & n.14 (opinion of Ginsburg, J.), referring to these suggestions as imposing controls "tighter than those now in effect.") Under the methodology of the court of appeals, a regulation limiting the

In sum, the regulatory prohibition against camping in Lafayette Park and the Mall is a reasonable and narrowly tailored measure designed to preserve these unique and beautiful places. There is no adequate substitute for this general and eminently sensible prohibition. And since the regulation creates no serious threat to First Amendment values, there should be no constitutional impediment to its enforcement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

LEONARD SCHAITMAN
KATHERINE S. GRUENHECK
Attorneys

DECEMBER 1983

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number of demonstrators (50?) or the length of an around-the-clock demonstration (one week?) would certainly be vulnerable to a "least restrictive alternative" attack.

APPENDIX

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

36 C.F.R. 50.27(a) provides:

> Camping is defined as the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging. Camping is permitted only in areas designated by the Superintendent who may establish limitations of time allowed for camping in any public camping ground. Upon the posting of such limitations in the campground no person shall camp for a period longer than that specified for the particular campground.

36 C.F.R. 50.19(e)(8) provides:

> In connection with permitted demonstrations or special events, temporary structures, [*sic*] may be erected for the purpose of symbolizing a message or

meeting logistical needs such as first aid facilities, lost children areas or the provision of shelter for electrical and other sensitive equipment or displays. Temporary structures may not be used outside designated camping areas for living accommodation activities such as sleeping, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging. Temporary structures are permitted to the extent described above, provided prior notice has been given to the Director, except that:

(i) No structures shall be permitted on the White House sidewalk.

(ii) All such temporary structures shall be erected in such a manner so as not to unreasonably harm park resources and shall be removed as soon as practicable after the conclusion of the permitted demonstration or special event.

(iii) The Director may impose reasonable restrictions upon the temporary structures permitted, in the interest of protecting the park areas involved, traffic and public safety considerations, and other legitimate park value concerns.

(iv) Any structures utilized in a demonstration extending in duration beyond the time limitations specified in paragraphs (e)(4)(i) and (ii) of this section must upon 24 hours notice be capable of being removed and the site restored or the structure

secured in such a fashion so as to not unreasonably interfere with use of the park area by other permittees authorized under this section.

(v) Individuals or groups of 25 persons or less demonstrating under the small group permit exemption of § 50.19(b)(1) shall not be permitted to erect temporary structures other than small lecterns or speakers platforms. This provision is not intended to restrict the use of portable signs or banners.

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